IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-774

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

Of Counsel:

JACK C. LANDAU
The Reporters Committee for Freedom of the Press
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

LLOYD N. CUTLER
DAVID R. ANDERSON
WILLIAM T. LAKE
WILLIAM J. KOLASKY, JR.
ALAN B. STERNSTEIN
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioners

February 2, 1979

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Neither the Government nor the telephone company respondents challenge the importance of the issue raised in the Petition: When the Government subpoenas the telephone company to produce a subscriber's toll records revealing the persons the subscriber calls, is the subscriber constitutionally entitled to reasonable advance notice in order to seek prior judicial scrutiny of his claim that the subpoena invades his First Amendment rights? Indeed, the importance of advance notice and the opportunity for prior judicial scrutiny before a threat-

ened invasion of First Amendment rights has been recognized so frequently in this Court's decisions as to foreclose any challenge to the need for such procedures. *See Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 561 (1975); *Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

Respondents have focused their attacks not on the need for such procedures to prevent invasions of First Amendment rights, but on the underlying validity of the asserted rights requiring procedural protection. Both Oppositions argue strenuously that the reporters and news organizations who are petitioners here have no rights deserving protection and that the court of appeals was therefore correct in denying any relief.

Their arguments reduce to three primary points:

> First, that although associations like the NAACP may have standing to object to a third party subpoena for records that may jeopardize their protected First Amendment activities, newsmen do not;[1]
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> Second, that even if newsmen have such a protected interest, that interest requires no more than that the subpoena be issued "in good faith";[2] and
>
> Third, that judicial relief is warranted only if a reporter learns on his own about a "bad faith" subpoena to a third party and shows that his personal First Amendment rights are imminently threatened.[3]

[1] *See* Gov't Br. at 12-13; AT&T Br. at 10-11.

[2] *See* Gov't Br. at 13; AT&T Br. at 10 n.13.

[3] *See* Gov't Br. at 9; AT&T Br. at 12-13. Respondents argue, in this connection, that petitioners are not entitled to equitable relief because "no subpoenas have been issued for any of petitioners' toll-call records in the last five years." (Gov't Br. at 9-10.) This suit was filed in December 1974. Petitioners' discovery ended in December 1975, and no one knows whether, or to what extent, reporters' toll records have been disclosed since then. The record does document five separate occasions on which petitioners' toll records were disclosed to the Government without notice to them before this litigation was commenced.

Respondents' first point proposes a hierarchy of First Amendment guarantees in which freedom of the press is held to be of lesser importance than other First Amendment rights. This Court squarely held in *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), that an association had standing to object to a subpoena to a third-party bank for records disclosing the identity of its members and contributors. Can a reporter's confidential relationship with his news sources be so much less important than the Servicemen's Fund's relationship with its members that he would not have equal standing to object when the Government, by subpoena or otherwise, seeks "the wholesale disclosure" of his news sources? Certainly nothing in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), or *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), suggests such a result.[4]

This is not a case where the press is asserting First Amendment rights superior to the rights of other persons. Once the underlying First Amendment rights of the press are recognized to be at least equal to those of other persons, the need for procedural protections follows al-

[4] The Government itself has similarly recognized the importance of a reporter's relationship with his news sources:

> "Those who gather and disseminate information to the public must rely heavily on persons both within and without government to disclose instances of wrongdoing, inefficiency, or neglect of duty. At the heart of the newsgathering function is the sensitive, fragile relationship between a reporter and his or her source. That relationship could be seriously jeopardized by the fear that the reporter's solemn pledge of confidentiality will be negated . . . . The interest of the media in this regard is not unlike that we in law enforcement have as it concerns our informants and sources.
>
> "The danger is not diminished merely because the power to search may be invoked only on rare occasions by the law enforcement officials, since the potential exercise of that power alone may chill sources on which the media and the public at large depend." Statement of Attorney General Griffin B. Bell to Members of the Press (December 13, 1978).

most automatically. Contrary to respondents' assertions,[5] it is of no consequence that the threat to First Amendment rights in *Branzburg* and *Stanford Daily* resulted from direct inquiries to members of the press whereas here they resulted from inquiries to third parties. How can one argue that newsmen or others have standing to seek to quash improper third-party subpoenas only if they are lucky enough to find out about them before the third party complies, but that they lack any right to be told of an improper subpoena's existence in time to invoke prior judicial scrutiny? If prior judicial scrutiny is important when the subpoena is served directly on the target of the threatened invasion, it is equally important when the subpoena is served on a third party, for the First Amendment interests involved are the same. In the former case, the service of the subpoena upon the target provides the constitutionally essential prior notice. In the latter case, the need for notice is just as plain and must be judicially declared.

Respondents' Briefs quibble with the relevance of this Court's footnote in *United States* v. *Miller*, 425 U.S. 435, 444 n.6 (1976), in which the Court left open the question whether notice of third-party subpoenas might be required where First Amendment interests are at stake.[6] It is of course true that, since *Miller* held that the respondent there had no Fourth Amendment rights in the records at issue, there was no reason to decide whether he was entitled to notice. But the relevance of the footnote's reference to a possible different result if *First Amendment* rights were involved is inescapable. Unless there were some reason to expect that the presence of First Amendment interests would make a difference, there would have been no reason to include the footnote.

[5] Gov't Br. at 11-12; AT&T Br. at 12-13.

[6] Gov't Br. at 10-11; AT&T Br. at 14.

Respondents' second point, drawn from the court of appeals' decision, is that good faith is the sole criterion by which subpoenas for records disclosing a reporter's news sources are to be judged. This point likewise amounts to a claim that the First Amendment interests of the free press enjoy less protection than other related interests. In *NAACP* v. *Alabama*, 357 U.S. 449 (1958), for example, the Court was not concerned just with whether Alabama's inquiry into the membership of the NAACP was conducted in good faith.[7] Surely the press is entitled to no lesser protection than the NAACP was afforded there. Quite the contrary, as the Court also noted in *NAACP*: "In the domain of . . . indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though *unintended*, may inevitably follow from varied forms of government action." [8]

Respondents' third and final point is that the relief petitioners seek is so "extraordinary" as to be unwarranted except in particular instances where there is an imminent threat to the confidentiality of news sources. Petitioners have a solid basis in the record for asserting that the necessary notice will usually be withheld whenever their records are sought.[9] The record also shows

[7] *See* 357 U.S. at 463.

[8] *Id.* at 461 (emphasis added). Respondents and the court of appeals overlook the careful language of Mr. Justice Powell's caveat in *Branzburg* that—wholly apart from the good faith *vel non* of the Government—a "newsman [who] is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or . . . [who] has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement," may seek judicial protection to quash altogether or narrow the scope of the Government's inquiry. 408 U.S. at 710. This standard requires consideration, not only of the good faith of the investigation, but also of the possible overbreadth of the request, the relevance of the information sought, and the authority under which the information is requested.

[9] *See* Petition at 5 n.6.

that they have specifically requested and been denied such notice, and that only shortly before the Complaint was filed, some of their toll records had been subjected to the telephone company policy of complying without notice. In circumstances such as these, where the system in general operates so as to permit the secret invasion of important First Amendment rights without prior notice or opportunity for judicial scrutiny, this Court has typically imposed protective procedures to prevent this danger.[10] Relief imposing such measures in this case would be no more extraordinary. If the State of Alabama had subpoenaed the telephone companies to produce NAACP toll records revealing the identity of many of its contributors and members, it is hard to believe that the Court which decided *NAACP* v. *Alabama* would not have ruled that the NAACP was entitled to prior notice in order to obtain prior judicial scrutiny before its First Amendment rights were invaded.

Both Briefs in Opposition close with the suggestion that if this Court will only stay its hand, the concededly important problem highlighted by the Petition will perhaps (but only perhaps) be resolved by either the Executive Branch or Congress. Of course, the speculative possibility of legislative and administrative action is wholly irrelevant to the issue whether the First Amendment requires an opportunity for the judicial protections that petitioners seek here. Moreover, in each legislative session since 1975, Congress has considered but failed to enact protections for journalists' relationships with their confidential news sources. This slack cannot be taken up by the Department of Justice's new revelation here

[10] *See McKinney* v. *Alabama*, 424 U.S. 669 (1976); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975); *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969); *Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Freedman* v. *Maryland*, 380 U.S. 51 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

that it is merely "considering the possibility" of amending its regulations to provide some protection.[11] And the Department of Justice's asserted restraint provides no constitutional safeguard against state law enforcement agencies or, for that matter, against any of the 30-odd other federal agencies with subpoena power.[12] Executive restraint, moreover, is no substitute for impartial judicial oversight when fundamental constitutional rights are imperiled.

The question presented for review by the Petition is concededly important. The court of appeals has decided that question contrary to this Court's precedents and in a manner that relegates the rights of the press to a lower position than other rights protected by the First Amendment. For these reasons and the reasons stated in the Petition, a writ of certiorari to review the decision of the court of appeals should be granted.

Respectfully submitted,

LLOYD N. CUTLER
DAVID R. ANDERSON
WILLIAM T. LAKE
WILLIAM J. KOLASKY, JR.
ALAN B. STERNSTEIN
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioners

Of Counsel:

JACK C. LANDAU
The Reporters
Committee for
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1750 Pennsylvania
Avenue, N.W.
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[11] Gov't Br. at 16.

[12] *See* Petition at 15 n.36.